

A JASMIRA OTHMAN v. TAN SRI HJ ABDUL HADI AWANG

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR PCA
ZABARIAH MOHD YUSOF FCJ
RHODZARIAH BUJANG FCJ
B [APPEAL NO: 02(f)-38-07-2023(T)]
13 NOVEMBER 2024

C **Abstract** – (i) *The need to plead the names of recipients of an alleged bribery is one of the basic facts which must be pleaded by the petitioner in an election petition when his cause of action is premised on bribery. A failure to do so will be detrimental to the election candidate alleged to have been involved in bribery;* (ii) *The net of agency could not be casted too wide to include even ordinary party supporters for there has to be a nexus or connection between the alleged agent handing out the bribery to the election candidate. There is no presumption of implied agency in election law even though the alleged agents and the election candidate are from the same party;* (iii) *When a State Executive Council has given approval to the giving of aids which is a ‘purely benevolent impulse,’ to equate it to bribery is not right because it could not be said to be beyond reasonable doubt that the aids are meant to bribe recipients.*

F **ELECTION:** *Petition – Election – Application to nullify election – Allegations of bribery – Non-calling of specific recipients of alleged bribes – Whether detrimental and prejudicial – Net of agency – Whether could be casted too wide to include ordinary party supporters – Whether there was nexus or connection between alleged agent handing out bribery to election candidate – Giving of aids – Whether pre-planned to induce voters for election candidate – Whether giving of aids could be equated to bribery*

G The appellant filed a petition in the High Court to nullify the election of the respondent as the representative for the Parliamentary constituency of Marang, Terengganu in the General Election, PRU 15, held on 19 November 2022. The appellant was a candidate from Barisan Nasional (‘BN’) whilst the respondent was from Parti Islam Se-Malaysia (‘PAS’). In his petition, the appellant contended that the respondent’s victory was premised on bribery evidenced by the following two incidences: (i) the giving of RM50 per registered voter by one Mohd Norddin Abd Jalil (‘Norddin’), allegedly the respondent’s agent at a surau on 19 November 2022, two of whom were Nor Shafiqah and Mohd Junaidi; and (ii) the giving of assistance by the respondent’s agent, PW8, PW9 and PW10 at an event conducted over a four-day period, called Majlis Penyerahan Bantuan i-Belia and i-Siswa, on

I

14 November 2022 till 18 November 2022 whereby, *inter alia*, chosen recipients were given RM150. On the alleged bribery at the surau, the Election Judge noted that since in his petition, the appellant had pleaded specifically two named persons as recipients of the bribe, he was bound by his pleading and must call them to testify but the appellant did not do so. The said failure of the appellant was prejudicial to the respondent. In this regard, the Election Judge rejected the appellant's attempt to adduce a video recording of PW2 to PW6 receiving the alleged bribery from Norddin, premised on the fact that the recorder of the video was not called as a witness and the non-production of a certificate under s. 90A of the Evidence Act 1950 ('EA') to verify that the video recorder was in good condition. On the alleged bribery of the graduate programmes, the Election Judge stated that these programmes had been approved by the Terengganu State Executive Council ('State Exco') and were therefore the State Government's official aids, and thus the giving of aids could not be the subject of corruption of bribery. The Election Judge dismissed the appellant's petition. Dissatisfied, the appellant filed this appeal.

Held (dismissing appeal)

Per Rhodzariah Bujang FCJ delivering the judgment of the court:

- (1) For the surau bribery, the non-calling of the two specifically named recipients of the alleged bribes by the appellant was detrimental to the respondent, as it was akin to a departure from his pleaded case and for which the calling of the other unpleaded alleged recipients namely PW2 to PW6 could not mitigate. The names of the said recipients were material facts which must be pleaded. The failure of the appellant to do so was prejudicial to the respondent since he had the right to know the exact identity of the persons receiving the bribery and the amount received in order to prepare a precise and valid defence. The respondent was entitled to know with clarity and certainty at the very earliest stage the name and identity of the persons to whom the alleged act (of bribery) was made or addressed. As for the rejection of the video evidence, what the appellant failed to highlight was the proviso to s. 73A of the EA which clearly qualifies the admission of such evidence (the video in this case) in the absence of the maker. In the absence of evidence justifying the non-applicability of the said proviso, it is trite law that evidence marked for identification could not be relied on as evidence by the court. (paras 5 & 6)
- (2) Norddin indeed was an important and material witness for the appellant. Even if there should not be an invocation of the said adverse inference under s. 114(g) of the EA against the appellant because the appellant's witnesses, PW2 to PW6, did not know him and given the non-calling of Nor Syafiq and Mohd Junaidi whom the appellant pleaded as the recipients of the alleged bribery from Norddin, the appellant's

- A contention that he was the respondent's agent was rejected. The net of agency could not be casted too wide to include even ordinary party supporters for there had to be a nexus or connection between the alleged agent and the respondent as the candidate. There is no presumption of implied agency in election law even though the alleged agents and the respondent were from the same party and in this case, even though Norddin was a committee member of PAS Marang Constituency at that material time. (para 8)
- B
- (3) The giving of aids during the campaign period was an undisputed fact. However, the said aids were part of the budget approved by the Terengganu's State Legislature on 15 November 2021, endorsed by His Royal Highness the Sultan of Terengganu on 27 January 2022, and then gazetted on 24 February 2022 (Terengganu Enactment A75). A paper on the implementation of the programs was earlier presented to and approved by the Terengganu's State Executive Council on 7 September 2022. However, considering that the applications for the aids had to be made online from 18 September 2022 to 7 October 2022, the process of verification of the approval was from 8 October 2022 to 17 October 2022, and the approval process was 18 October 2022 to 27 October 2022, the said programs could only be held from 30 October 2022 to 30 November 2022. Dissolution of Parliament was only made on 10 October 2022 and the Parliamentary General Election was held on 19 November 2022. Therefore, on the face of it, the giving of these aids was not pre-planned to induce voters to vote for the respondent, although undeniably the timing was just right for the respondent. (para 10)
- C
- D
- E
- F
- (4) These aids were presented by three persons, PW8, PW9 and P10 during the last week of the campaign period till the day before the election itself. None of the recipients was called to give evidence. PW8, PW9 and PW10 were either the Exco of the State or Deputy Exco. They had handed the aids not as agents of the respondent but by virtue of their official positions in the Terengganu State Exco. Thus, given the antecedent approval given by the State Executive Council to the giving of these aids which was 'a purely benevolent impulse', to equate it to a bribery, given that background of the said aids, would not be right because it could not be said to be beyond reasonable doubt that those aids were meant to bribe the recipients. There was nothing sinister in the giving of the said aids. (paras 10 & 11)
- G
- H

I

Bahasa Melayu Headnotes

Perayu memfailkan petisyen di Mahkamah Tinggi untuk membatalkan pemilihan responden sebagai wakil bagi kawasan Parlimen Marang, Terengganu pada Pilihan Raya Umum, PRU 15, yang diadakan pada 19 November 2022. Perayu ialah calon Barisan Nasional ('BN') manakala responden calon Parti Islam Se-Malaysia ('PAS'). Dalam petisyennya, perayu berhujah bahawa kemenangan responden adalah berdasarkan rasuah yang dibuktikan oleh dua insiden berikut: (i) pemberian RM50 bagi setiap pengundi berdaftar oleh seorang Mohd Norddin Abd Jalil ('Norddin') yang didakwa ejen responden di surau pada 19 November 2022, dua daripadanya adalah Nor Shafiq dan Mohd Junaidi; dan (ii) pemberian bantuan oleh ejen-ejen responden, PW8, PW9 dan PW10 di acara yang dijalankan dalam tempoh empat hari, dipanggil Majlis Penyerahan Bantuan i-Belia dan i-Siswa, pada 14 November 2022 hingga 18 November 2022 di mana, antara lain, penerima-penerima terpilih diberi RM150. Mengenai dakwaan rasuah di surau, Hakim Pilihan Raya dengan tepat menyatakan bahawa oleh kerana dalam petisyennya, perayu telah merayu secara khusus dua orang yang dinamakan sebagai penerima rasuah, dia terikat dengan pengakuannya dan mesti memanggil mereka untuk memberi keterangan tetapi perayu tidak berbuat demikian. Kegagalan perayu tersebut memudaratkan responden. Sehubungan itu, Hakim Pilihan Raya menolak percubaan perayu untuk mengemukakan rakaman video PW2 hingga PW6 menerima rasuah yang didakwa daripada Norddin, berdasarkan fakta bahawa orang yang merakam video itu tidak dipanggil sebagai saksi dan tidak mengeluarkan sijil bawah s. 90A Akta Keterangan 1950 ('AK') untuk mengesahkan bahawa perakam video berada dalam keadaan baik. Mengenai dakwaan rasuah program siswazah, Hakim Pilihan Raya menyatakan dengan betul, bahawa program itu telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri Terengganu ('Exco Negeri') dan oleh itu adalah bantuan rasmi daripada Kerajaan Negeri, dan pemberian bantuan tidak boleh menjadi subjek rasuah. Hakim Pilihan Raya menolak petisyen perayu. Tidak berpuas hati, perayu memfailkan rayuan ini.

Diputuskan (menolak rayuan)**Oleh Rhodzariah Bujang HMP menyampaikan penghakiman mahkamah:**

- (1) Tentang rasuah surau, kegagalan memanggil kedua-dua penerima yang dinamakan secara khusus bagi dakwaan rasuah oleh perayu memudaratkan responden, kerana itu adalah serupa dengan penyimpangan daripada kes yang dirayunya dan yang mana panggilan penerima-penerima lain yang didakwa tanpa rayuan iaitu PW2 hingga PW6 tidak boleh digunakan sebagai mitigasi. Nama-nama penerima tersebut adalah fakta material yang mesti dirayu. Kegagalan perayu berbuat demikian memudaratkan responden kerana dia mempunyai hak untuk mengetahui identiti sebenar orang yang menerima rasuah dan

- A jumlah yang diterima untuk menyediakan pembelaan yang tepat dan sah. Responden berhak mengetahui dengan jelas dan pasti pada peringkat paling awal nama dan identiti orang yang didakwa perbuatan (rasuah) itu dibuat atau dialamatkan. Bagi penolakan bukti video, apa yang gagal diketengahkan oleh perayu adalah proviso kepada s. 73A AK yang jelas
- B melayakkan penerimaan keterangan tersebut (video dalam kes ini) tanpa kehadiran pembuat. Sekiranya tiada bukti yang menjustifikasikan ketidakgunaan proviso tersebut, adalah undang-undang matan bahawa bukti yang ditanda untuk pengenalan tidak boleh diterima sebagai keterangan oleh mahkamah.
- C (2) Norddin sememangnya saksi penting dan material bagi perayu. Walaupun tidak sepatutnya ada permohonan inferens bertentangan bawah s. 114(g) AK terhadap perayu kerana saksi perayu PW2 hingga PW6 tidak mengenalinya dan memandangkan ketidakpanggilan Nor Syafiqah dan Mohd Junaidi yang perayu merayu sebagai penerima rasuah yang didakwa daripada Norddin, dakwaan perayu bahawa dia adalah
- D ejen responden telah ditolak. Jaringan agensi tidak boleh dilemparkan terlalu luas untuk memasukkan penyokong parti biasa kerana perlu ada hubungan atau hubungan antara ejen yang didakwa dan responden sebagai calon. Tiada anggapan agensi tersirat dalam undang-undang pilihan raya walaupun ejen yang didakwa dan responden adalah daripada
- E parti yang sama dan dalam kes ini, walaupun Norddin adalah ahli jawatankuasa Kawasan PAS Marang pada masa itu.
- (3) Pemberian bantuan semasa tempoh kempen adalah fakta yang tidak dapat dipertikaikan. Walau bagaimanapun, bantuan tersebut adalah sebahagian daripada bajet yang diluluskan oleh Dewan Undangan Negeri Terengganu pada 15 November 2021, yang disahkan oleh Duli Yang Teramat Mulia Sultan Terengganu pada 27 Januari 2022, dan kemudian diwartakan pada 24 Februari 2022 (Enakmen Terengganu A75). Kertas kerja pelaksanaan program tersebut sebelum ini telah dibentangkan dan diluluskan oleh Majlis Mesyuarat Kerajaan Negeri Terengganu pada
- G 7 September 2022. Memandangkan permohonan bantuan itu perlu dibuat secara atas talian dari 18 September 2022 hingga 7 Oktober 2022, proses pengesahan kelulusan adalah dari 8 Oktober 2022 hingga 17 Oktober 2022, dan proses kelulusan adalah dari 18 Oktober 2022 hingga 27 Oktober 2022, program tersebut hanya boleh diadakan dari
- H 30 Oktober 2022 hingga 30 November 2022. Pembubaran Parlimen hanya dibuat pada 10 Oktober 2022 dan Pilihan Raya Umum Parlimen diadakan pada 19 November 2022. Oleh itu, pada hakikatnya, pemberian bantuan ini tidak dirancang terlebih dahulu untuk mendorong pengundi mengundi responden, walaupun tidak dinafikan masanya
- I adalah sesuai untuk responden.

- (4) Bantuan ini disampaikan oleh tiga orang iaitu PW8, PW9 dan P10 pada minggu terakhir tempoh kempen sehingga sehari sebelum pilihan raya itu sendiri. Tiada seorang pun penerima dipanggil untuk memberi keterangan. PW8, PW9 dan PW10 adalah sama ada Exco Negeri atau Timbalan Exco. Mereka telah menyerahkan bantuan itu bukan sebagai ejen responden tetapi berdasarkan jawatan rasmi mereka di Exco Negeri Terengganu. Oleh itu, memandangkan kelulusan terdahulu yang diberikan oleh Majlis Mesyuarat Kerajaan Negeri untuk pemberian bantuan ini yang ‘merupakan dorongan semata-mata’, untuk menyamakannya dengan rasuah, memandangkan latar belakang bantuan tersebut, adalah tidak betul kerana itu tidak boleh dikatakan melampaui keraguan munasabah bahawa bantuan tersebut bertujuan untuk merasuah pengundi. Tiada apa-apa niat jahat dalam pemberian bantuan tersebut.

Case(s) referred to:

- Abdul Hakim Abdul Wahid v. Mas Ermieyati Samsudin & Another Appeal* [2023] 6 CLJ 667 FC (*refd*)
- Ahmad Faisal Abdul Karim v. Mohd Radzi Md Jidin* [2023] 4 CLJ 167 HC (*refd*)
- Audrey Karen Barry v. Datuk Dr Yee Moh Chai* [2010] 3 CLJ 660 FC (*refd*)
- Borough Of Plymouth* [1880] 3 O’M & H 107 (*refd*)
- Borough Of Wakefield* [1874] 2 O’M & H 100 (*refd*)
- Dato’ Mohd Zubir Embong v. Datuk Hj Ahmad Amzad Mohamed* (EP No TA-260P-2-01-2023) (Unreported) (*refd*)
- DP Mishra v. Kamal Narain Sharma & Ors* [1971] AIR 856 (*refd*)
- Goh Kooi Pheng v. PP* [2013] 1 CLJ 190 CA (*refd*)
- Isnin Hj Aliasnih v. Lajim Ukin* [2014] 6 CLJ 950 FC (*refd*)
- Jikulin Nointin v. Gapari Kitingan & Ors* [2018] CLJU 1858; [2018] 1 LNS 1858 HC (*refd*)
- Kho Whai Phiaw v. Chong Chieng Jen* [2008] CLJU 785; [2008] 1 LNS 785 HC (*refd*)
- Kho Whai Phiaw v. Chong Chieng Jen* [2009] 3 CLJ 201 FC (*refd*)
- Magendran Mohan v. PP* [2011] 1 CLJ 805 FC (*refd*)
- Manogaran Marimuthu v. Sivaraj Chandran* [2018] CLJU 2062; [2018] 1 LNS 2062 HC (*refd*)
- Modular Tropical Ventures (M) Sdn Bhd v. George Varughese & Another Case* [2019] 9 CLJ 812 HC (*refd*)
- Mohd Nazri Hj Din v. Dato’ Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors* [2009] 3 CLJ 221 FC (*refd*)
- Mohd Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors* [2010] 8 CLJ 608 HC (*refd*)
- Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC (*refd*)
- PP v. Datuk Hj Harun Hj Idris & Ors* [1977] CLJU 92; [1977] 1 LNS 92 HC (*refd*)
- RNS Oil And Gas Sdn Bhd v. Norhayati Ahmad Kamal* [2016] CLJU 1113; [2016] 1 LNS 1113 HC (*refd*)
- S Harcharn Singh v. S Sajjan Singh & Ors* [1985] AOR 236 (*refd*)
- Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 FC (*refd*)
- Shanta Manickam v. Teik Joo Chan Sdn Bhd & Anor* [2015] 8 CLJ 611 HC (*refd*)
- Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674 CA (*refd*)
- Wan Mohamad Hisham Wan Abdul Hamid v. Che Alias Hamid Mohamed* (TA-26PP-4-01-2023) (Unreported) (*refd*)
- Wan Sagar Wan Embong v. Harun Taib* (No 2) [2009] 1 CLJ 457 FC (*refd*)

A Legislation referred to:

Election Offences Act 1954, ss. 10, 11, 32
Evidence Act 1950, ss. 73A(1), (2), 90A, 114(g), 134

For the appellant - Mohd Hafarizam Harun, Abu Bakar Isa Ramat, Mohamed Baharudeen Mohamed Ariff, Norhazira Abu Haiyan & Muhammad Amin Othman; M/s Hafarizam Wan & Aisha Mubarak

B *For the respondent - Takiyuddin Hassan, Wan Rohimi Wan Daud, Yusfarizal Yussof & Mohd Faizi Che Abu; M/s Faizi & Assocs*

Reported by Suhainah Wahiduddin

C JUDGMENT

Rhodzariah Bujang FCJ:

D [1] The appellant in this appeal before us had filed a petition in the High Court of Kuala Terengganu to nullify the election of the respondent as the representative for the Parliamentary constituency of Marang, Terengganu in the last General Election, PRU 15, held on 19 November 2022. After a full trial, the learned election judge dismissed the same with cost of RM50,000. Dissatisfied with that outcome, the appellant filed this appeal before us, which we heard on 15 November 2023 and with the end result, which disfavours the appellant as well, delivered orally by us at the conclusion of the said hearing after considering the written and oral submissions of both parties and perusing through the cause papers. Our reasons for deciding so would be enumerated herein below but to better appreciate our reasonings, we would first lay down some salient background facts respecting the parties and their dispute.

F Background Facts

G [2] The parties herein were two out of four candidates vying for the Marang seat. The appellant was a candidate from Barisan Nasional (BN), whilst the respondent was from PAS (Parti Islam Se-Malaysia) and the other two were from PEJUANG and Pakatan Harapan (PH). It is necessary to now tabulate the number of votes garnered by each of the said candidates for a reason to be elucidated later in this judgment of ours.

	Candidate	Party	No of Votes
H	i. Tan Sri Hj Abdul Hadi Awang	PAS	73115
	ii. Jasmira bin Othman	BN	31386
	iii. Dr Zarawi bin Sulong	PEJUANG	427
	iv. Ustaz Azhar	PH	4140

I

In his petition, the appellant contended that the respondent's victory was premised on bribery, evidenced by the following two incidences: A

- (i) the giving of RM50 per registered voter by one Mohd Norddin bin Abd Jalil ("Norddin"), allegedly the respondent's agent at Surau Ar-Ridwan, Kampung Tok Hakim at Jalan Pelong, Padang Midin on 19 November 2022, two of whom are Nor Shafiq Azima binti Azam and Mohd Junaidi bin Embong. B
- (ii) the giving of assistance by the respondent's agent, namely PW8 (YB Mohd Nor Hamzah), PW9 (YB Sulaiman Sulong) and PW10 (YB Ariffin Deraman) at an event conducted over a four days period, called Majlis Penyerahan Bantuan i-Belia and i-Siswa, on 14 November 2022 till 18 November 2022. The details of the alleged bribery at the said functions are particularised as follows: C
 - (a) one-off payment of RM150 to a chosen recipient at Duyung Convention Centre on 14 November 2022. D
 - (b) one-off payment of RM150 to each of the chosen recipient at Dewan Sivik Bukit Payung on 14 November 2022.
 - (c) one-off payment of RM150 to each chosen graduate at Dewan Terbuka Kampung Binjai Bongkok on 18 November 2022. E
 - (d) one-off payment of RM150 to each of the chosen recipient at Dewan Tok Guru, Rusila on 16 November 2022.
 - (e) one-off payment of RM150 to each of the chosen graduate at Dewan Besar IKBN Wakaf Tapai on 17 November 2022. F
 - (f) one-off payment of RM150 to each of the chosen graduate at Dewan Sivik Bukit Payung on 17 November 2022.

The Law

[3] There is a specific statutory prohibition against the giving of bribery before, during or after an election which when proved, nullifies the result of the said election namely, s. 32 of the Election Offences Act 1954 ("the Act") which provides as follows: G

32. Avoidance of election on election petition

The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the election judge: H

- (a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the election; I

- A (b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;
- B (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
- (d) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court, or by the report of an election judge; or
- C (e) that the candidate was at the time of his election a person disqualified for election.
- D More particularly, s. 10 of the Act makes the giving of bribery an offence and punishable under s. 11, thereof, evidencing the clear abhorrence of the law against this illegal practice.

10. Bribery

The following persons shall be deemed guilty of the offence of bribery:

- E (a) every person who, before, during or after an election, who directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers, promises, or promises to procure or to endeavour to procure, any money or valuable consideration to or for any elector or voter, or to or for any person
- F on behalf of any elector or voter or to or for any other person, in order to induce any elector or voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such elector or voter having voted or refrained from voting at any election;
- G (b) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place or employment to or for any elector or voter, or to or for any person on behalf of any elector or voter, or to or for any other person, in order to induce such elector or voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any elector or voter having voted or refrained from voting at any election;
- H (c) every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election;
- I

- (d) every person who, either before, or during an election, upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any elector or voter at an election; A
- (e) every person who, either before, or during an election, advances or pays or causes to be paid any money to, or to the use of, any other person with the intent that such money or any part thereof shall be expended in bribery at any election or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any such election; B
C
- (f) every elector or voter who, before or during any election directly or indirectly, by himself or by any other person on his behalf, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place or employment, for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any such election; D
- (g) every person who, after any election, directly or indirectly, by himself or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting at any such election; E
- (h) every person who, after an election directly or indirectly, by himself or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or on account of and as payment for his having assisted or agreed to assist any election, applies to such candidate, or to his agent or agents, for the gift or loan of any money or valuable consideration, or for the promise of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; and F
G
- (i) every person who, either before, or during an election, directly or indirectly, by himself or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if he has become a candidate, gives or procures any office, place or employment, or agrees to give or procure or offers or promises to procure or to endeavours to procure any office, place or employment, to or for such other person, or gives or lends, or agrees to give or lend, or offers, or promises to procure or to endeavor to procure any money or valuable consideration to or for any person or to or for such other person, or to or for any person on behalf of such other person. H
I

A 11. Punishment and incapacities for corrupt practice

(1) Every person who:

- (a) Commits the offence of personation, or aids, abets, counsels or procures the commission of the offence of personation;
- B** (b) Commits the offence of treating, undue influence or bribery;
- (c) Prints, publishes, distributes or posts up or causes to be printed, published, distributed, or posted up any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names and addresses of its printer and publisher;
- C** (d) Makes or publishes, before or during any election, for the purpose of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate;
- D** (e) Makes or publishes, before or during any election, for the purpose of promoting or procuring the election of any candidate; any false statement of the withdrawal of any other candidate at such election; or
- (f) Being a candidate or election agent knowingly makes the declaration as to election expenses required by section 23 falsely,
- E**

shall be guilty of a corrupt practice, and shall, on conviction by a Session Court, be liable, in the case referred to in paragraphs (a) and (b), to imprisonment for a term not exceeding two years and to a fine of not less than one thousand ringgit and not more than five thousand ringgit, and, in any other case, to imprisonment for a term not exceeding one year and to a fine not exceeding two thousand ringgit. Offences under paragraph (a) and (b) shall be seizable offences within the meaning of the Criminal Procedure Code.

- F**
- (2) Every person who is convicted of a corrupt practice shall, subject to any specific provision to the contrary in any written law relating to any election, by conviction become incapable of being registered or listed as an elector or of voting at any election or of being elected by any election, and if at that date he has been elected at any election, his seat shall be vacated from the date of such conviction:
- G**

H Provided that such disability shall cease on the expiry of five years from such conviction.

- (3) A prosecution for a corrupt practice except any corrupt practice as defined in paragraph (d) and (e) of subsection (1) shall not be instituted without the sanction of the Public Prosecutor.
- I** (4) Within eight weeks from the publication of the results of the election, the Public Prosecutor shall prepare and submit a report to the Election Commission, the person or persons lodging the

complaints of offences under this Act and all political parties, setting out the list and particulars of complaints of offences under this Act during the course of the election; stating particulars of the offences for which he has given consent for prosecution and setting out the reasons for those offences which he has not given such consent.

A

It is trite law that given the seriousness of the abovementioned punishment, which is penal in nature, meted out to those guilty of election offences, an election petition is *quasi*-criminal in nature and the standard of proof in proving the allegations stated therein is beyond reasonable doubt, as had been lucidly stated in cases listed out in the learned election judge's grounds of judgment and the written submissions of both learned counsel in this appeal, such as that of this court in *Audrey Karen Barry v. Datuk Dr Yee Moh Chai* [2010] 3 CLJ 660 and *Isnin Hj Aliasnih v. Lajim Ukin* [2014] 6 CLJ 950. Both cases had also quoted the same excerpt reproduced in the judgment of Azizah Hj Nawawi J (as Her Ladyship then was) in *Manogaran Marimuthu v. Sivaraj Chandran* [2018] CLJU 2062; [2018] 1 LNS 2062 on the elements to be proven in order to discharge that high standard of proof when bribery is alleged, which we are equally moved to do, *ie*, reproduce, given the clear necessity of proving the said elements in this appeal and they are as follows:

B

C

D

[17] Therefore, under section 32(c) of Act 5 read with section 10, the Petitioner is to prove the following elements:

E

(i) **that before, during or after an election, either**

- (a) gives money to an elector or voter [section 10(a)], or
- (b) by another person with the Respondent's knowledge or consent.

F

(ii) **either**

- (a) Gives money to an elector or voter [section 10(a)],
- (b) Gives money to any person [section 10(c)], or
- (c) Advances, or pays or causes to be paid any money to any person [section 10(e)]

G

(iii) **for the following purpose:**

- (a) In order to induce the recipient of that money to vote or refrain from voting in the election [section 10(a)],
- (b) In order to induce the recipient of that money to procure or endeavor to procure the election of the Respondent [section 10(b)], or
- (c) With the intent that such money or any part thereof shall be expended in bribery at any election [section 10(e)].

H

(emphasis added)

I

- A As noted by the fairly recent decision of this court in *Abdul Hakim Abdul Wahid v. Mas Ermieyati Samsudin & Another Appeal* [2023] 6 CLJ 667, the statutory requirement of election law is mandatory in nature, which must be strictly observed because parties' rights in an election and the election dispute are governed by statute or special law which is unknown to common law or equity. This legal point was reiterated by the appellant's counsel before us as well.

- [4] In exercising our appellate jurisdiction, including in election petition cases, we always remind ourselves that we should be slow to disturb the findings of facts made by the trial judge and the word of Jayantilal Chhotalal Shah CJ when delivering the judgment of the Supreme Court of India in the election case of *DP Mishra v. Kamal Narain Sharma & Ors* [1971] AIR 856 provide a clear reminder of the same and we quote:

19. We have carefully considered the evidence and just circumstances, and we do not think that a case is made out justifying us in taking a view different from the view of the High Court. *The proceeding before us is quasi-criminal in character, and this court will not normally disagree with the view of the High Court, where the High Court has reached, on appreciation of evidence, the conclusion that the corrupt practice charged against a person is not proved. This Court has jurisdiction in appropriate cases to disagree with the conclusion reached by the High Court, but the power to interfere is sparingly exercised. It is not exercised merely because this Court may take on the evidence a different view. An appellate Court is reluctant to disregard the conclusion on matters of appreciation of evidence by the Court which had occasion to watch the demeanour of the witnesses examined before it, and to substitute its own view thereon. Where the proceeding triad by the Court of First Instance is of quasi-criminal nature, the reluctance of the appellate court is greater. The question is not one of power or authority of the appellate court, but of the respect and consideration due to the Court of First Instance and of the limit inherent in the exercise of the appellate functions.*

(emphasis added)

- [5] Further, the learned election judge has had the advantage over the appellate court judges in assessing the witness's demeanour. Groove J in *Borough Of Wakefield* [1874] 2 O'M & H 100 had this to say on the credibility of evidence given by bribed persons:

- It is perfectly true that where witnesses are called to prove that they themselves were bribers, their testimony is open to suspicion, varying in degree with the circumstances under which that testimony is given, and its effect upon the judge must depend a good deal upon the demeanour of the witnesses, and to such circumstances as many transpire to lead to any fair or well-founded opinion as to whether, although they are tainted with the necessary admission that they have been guilty of improper practices, they are so tainted that their evidence is to be disbelieved altogether, or whether what I may call circumstantial value of their evidence is such that they may be believed, although they do not come forward in a reputable character. There are no infallible rules to be laid down upon such a matter as this, and very slight differences may turn the scale and influence the mind of the tribunal, as to whether the witness is to be believed or not. The answer to one or two questions, the mode*

of the answer, the observation as to whether there is anything evasive, or whether the witness fairly makes what is commonly called a clean breast of it is in an honest and straightforward way; all these are matters for consideration by the tribunal. Independently of this there are also the sources from which the evidence comes, as, for instance, supposing that three or four witness come from what may be considered a prejudiced source indicating something in the nature of a conspiracy, or that on the other hand they come from such a variety of different sources that it is not likely or would not be reasonable to presume that they had all been induced, without any apparent reason, or without any single predominating motive, to come and tell a series of falsehoods. All these circumstances and a vast number of others have to be looked at, some of them so delicate and difficult of appreciation that they hardly admit of being described in words as to their effect upon the mind of a judge who tries a case of this description.

(emphasis added)

Judgment Of The Learned Election Judge

[6] In summary, His Lordship's findings are as follows:

- (i) on the alleged bribery at the Surau, the learned election judge rightly noted that since in his petition, the appellant had pleaded specifically two named persons as recipients of the bribe, he was bound by his pleading and must call them to testify but the appellant did not do so. Instead, the appellant called five alleged recipients, *ie*, PW2 to PW6 and their unpleaded evidence of receiving RM450 according to the learned election judge were unacceptable in law, citing *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 and more particularly this court's decision in *Kho Whai Phiaw v. Chong Chieng Jen* [2009] 3 CLJ 201, which is specifically on the stringent requirement of pleading in an election petition case. The said failure of the appellant, according to the learned election judge, was prejudicial to the respondent since he has the right to know the exact identity of the persons receiving the bribe and the amount received in order to prepare a precise and valid defence. In this regard, the learned election judge went on to reject the appellant's attempt to adduce a video recording of PW2 to PW6 receiving the alleged bribery from Norddin and his instruction to them to say "Wallahi saya undi PAS" and their compliance with his instruction as aforesaid. That rejection was premised on the fact that the recorder of the video was not called as a witness and the non-production of a certificate under s. 90A of the Evidence Act 1950 to verify that the video recorder was in good condition. His Lordship thus ruled that based on the infirmities above and the non-calling of the two named recipients, the real identity of Norddin was not proven beyond reasonable doubt, which burden rested on the appellant's shoulders, as per this court's decision in *Isnin's* case (*supra*). Further, held His Lordship, the non-calling of Norddin attracts s. 114(g) of the

- A Evidence Act 1950 and, therefore, the appellant had failed to prove that Norddin was the respondent's agent and of the alleged bribery at the said Surau;
- (ii) on the alleged bribery at the six graduate programmes, the learned election judge stated and correctly so, that these programmes had been approved by the Terengganu State Executive Council ("State Exco") and were therefore the State Government's official aids, that the remunerations were approved by the State Legislative Assembly on 15 November 2021, then by His Majesty, the Sultan of Terengganu on 27 January 2022 and gazetted on 24 February 2022. Therefore,
- B His Lordship held that the giving of these aids cannot be the subject of corruption or bribery under the Act. With regards to the allegation of the appellant that PW8, PW9 and PW10, who were the Exco members and Deputy Exco of Terengganu State Assembly, respectively, were the respondent's agent, the learned election judge held, based on this court's decision in *Wan Sagar Wan Embong v. Harun Taib (No 2)* [2009] 1 CLJ 457 that the appellant had failed to prove 'the element of appointment' of an agent of the appellant which this court held must be pleaded and proved. On the other hand, His Lordship noted that, the direct evidence shows that they were not the respondent's agents as they officiated at the said events on invitations based on their official capacities as representatives of the State Government and the Chief Minister of Terengganu, which facts according to him are clearly distinguishable from *Manogaran's* case (*supra*) given the clear evidence, *inter alia*, that the respondent had no knowledge of the said events. Despite making the aforesaid finding, the learned election judge went on to consider whether the giving of the said aids had influenced the voters and held that the recipients of the aids must be called to give evidence as only they could prove beyond reasonable doubt that the said aids influenced them to vote for the respondent or PAS. His Lordship also considered the fact that the total number of recipients of the aids were 6,286 whereas the respondent won by a majority of 48,377 votes and given that wide majority, the giving of the aids had no substantial effect on the outcome of the election. In His Lordship's view, even considering that the aids were given inside a green envelope containing photograph of the Exco members with or without their wives at the said functions where the backdrop has the party's logo with the respondent's photograph, as well as the putting up of the PAS flags and PW10's speech inviting the attendees to vote for the respondent, but to say that the said recipients were influenced by the said gifts are demeaning and an insult to the political awareness of the registered voters in Marang. With regards to the issue of whether the aids were given to canvass for the said voters because they were given at the last week of the campaigning period, the
- C
- D
- E
- F
- G
- H
- I

learned election judge was of the view that because the aids were approved on 7 September 2022 in the Supply Enactment 2022 before Parliament was dissolved, there was no element of corruption involved and in view of the evidence which justified the delay in handling out the aids and why it could only be done on the said date. These reasonings we would elaborate further later in our judgment; and

- (iii) on the other hand, the learned election judge was convinced with the veracity of the respondent's evidence that his only agent was one Mohd Nasir bin Ismail and not Norddin, nor PW8 to PW10 and that he was never involved in the graduate programmes because they were the official ones of the State Government which he had no direct knowledge of.

The Appeal

The Surau Bribery

[7] Before us, learned counsel for the appellant submitted that the learned election judge was wrong in his findings on this allegation because of the non-pleading issue because in para. 6 of his petition, the appellant had pleaded that there were a number of bribes given and at para. 6.1, thereof, he alleged that the bribery was given not just to Nor Shafiqah and Mohd Junaidi, so therefore, there was no surprise. Further, a list of witnesses to be called by the appellant was filed in court before the trial and as provided by s. 134 of the Evidence Act 1950, no particular number of witnesses is required to prove any fact in a case before the court. Granted that there is that clear leeway given by that statutory provision by statute and in this case, the general pleading of the appellant in para. 6.1 as stated above, nevertheless, in our view, the non-calling of the two specifically named recipients of the alleged bribes by the appellant was rightly held by the learned election judge to be detrimental to the respondent, as it is akin to a departure from his pleaded case and for which the calling of the other unpleaded alleged recipients namely PW2 to PW6 could not mitigate. Further, as raised by learned counsel for the respondent in his written submission, the names of the said recipients are material facts which must be pleaded under r. 4(I)(6) of the Regulation to enable the respondent to effectively prepare his defence to the petition, citing, *inter alia*, *Samuel Naik Siang Ting's* case (*supra*), *Mohd Zaid Ibrahim v. P Kamalanathan P Panchanathan & Ors* [2010] 8 CLJ 608 and *Ahmad Faisal Abdul Karim v. Mohd Radzi Md Jidin* [2023] 4 CLJ 167. As held in *Mohd Zaid's* case (*supra*), the first respondent in the said case, and likewise the respondent in our case here, is entitled to know with clarity and certainty at the very earliest stage the name and identity of the persons to whom the alleged act (of bribery) was made or addressed, citing, *inter alia*, *Mohd Nazri Hj Din v. Dato' Seri Raja Ahmad Zainuddin Raja Hj Omar & Ors* [2009] 3 CLJ 221. It is to be noted as well that in *Ahmad Faisal's* case (*supra*), the need to plead

- A the names of the recipients of the alleged bribery was specifically listed as one of the eight basic facts which must be pleaded by the petitioner in an election petition when his cause of action is premised on bribery.

Rejection Of The Video Evidence

- B [8] Learned counsel for the appellant referred us in his written submission to the case of *RNS Oil And Gas Sdn Bhd v. Norhayati Ahmad Kamal* [2016] CLJU 1113; [2016] 1 LNS 1113; [2016] MLJU 934 to submit that even though the said video of Norddin who was a member of the PAS Marang Branch Working Committee and holding various posts in the Marang Branch, *ie*, Head of the Sidang Assabiqun; Financial and Assets Committee
- C Member, the fifth assistant of the Election Division, and Government, Private and NGO Lajnah Member, was denied by the respondent as his agent and that video was only marked for identification (*ie*, ID14), the election judge has the discretion and power under s. 73A(2) of the Evidence Act 1950 to consider its admissibility at the end of the trial. Here, he submitted further
- D the video clearly shows the said Norddin directing a few individuals to swear “Wallahi, saya undi PAS” before giving the money to them and one of whom was Long bin Mohd Sulaiman (PW2), who gave evidence to say that he did as directed. Learned counsel also highlighted PW2’s evidence that the individual in the video and that in the photograph marked as ID14 and ID17
- E was the same person. However, with due respect to learned counsel for the appellant, what he failed to highlight is the proviso to s. 73A which clearly qualifies the admission of such evidence (the video in this case) in the absence of the maker, which is reproduced below together with sub-s. 1 only, being the relevant provision:
- F 73A. (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
- G (a) If the maker of the statement either
- (i) Had personal knowledge of the matters dealt with by the statement; or
- (ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had, personal knowledge of those matters; and
- H

I

- (b) If the maker of the statement is called as a witness in the proceedings:

A

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

B

(emphasis added)

[9] In the absence of evidence justifying the non-applicability of the said proviso, it is trite law that evidence marked for identification cannot be relied on as evidence by the court as rightly submitted by learned counsel for the respondent, citing *Shanta Manickam v. Teik Joo Chan Sdn Bhd & Anor* [2015] 8 CLJ 611; *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] CLJU 92; [1977] 1 LNS 92; [1977] 1 MLJ 180 and *Modular Tropical Ventures (M) Sdn Bhd v. George Varughese & Another Case* [2019] 9 CLJ 812.

C

The Non-calling Of Norddin As A Witness

D

[10] Learned counsel for the appellant submitted that the non-calling of Norddin due to a futile attempt to subpoena him and the non-filing of the affidavit of non-service is not fatal to his client's case because the respondent in his own evidence admitted knowing him because Norddin was a member of PAS Marang's Branch Working Committee as well as various other position which we had mentioned earlier. Therefore, no adverse inference under s. 114(g) of the Evidence Act 1950 should be invoked against him as submitted by learned counsel for the appellant citing *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 and *Thong Foo Ching & Ors v. Shigenori Ono* [1998] 4 CLJ 674; [1998] 4 MLJ 585. However, as considered by the learned election judge in para. 39 of his grounds of judgment, Norddin indeed was an important and material witness for the appellant. Even if there should not be an invocation of the said adverse inference under s. 114(g) against the appellant because the appellant's witnesses PW2 to PW6 do not know him and given the non-calling of Nor Shafiq Azima binti Azam and Mohd Junaidi bin Embong whom the appellant pleaded specifically in para. 6.8(i) and (ii) of his petition as the recipients of the alleged bribery from Norddin, we are synonymous with the learned election judge's decision to reject the appellant's contention that he was the respondent's agent. As had been decided by this court in *Wan Sagar Wan Embong's case (supra)*, the net of agency cannot be cast too wide to include even ordinary party supporters for there has to be a nexus or connection between the alleged agent and the respondent as the candidate. In other words, as held in *Jikulin Nointin v. Gapari Kitingan & Ors* [2018] CLJU 1858; [2018] 1 LNS 1858, there is no presumption of implied agency in election law even though the alleged agents and the respondent are from the same party and in this case, even though Norddin was a committee member of PAS Marang Constituency at that material time. It is opportune to note

E

F

G

H

I

- A on this score that this court in *Isnin's* case (*supra*) similarly rejected the allegation of bribery by the respondent's polling agent, one Norlia based similarly on the appellants' failure in the said case to adduce sufficient evidence to establish her appointment as the respondent's agent and therefore found that her giving of the bribe was done on a frolic of her own. This puts
- B to rest this issue on the alleged bribery at the Surau.

Bribery At The i-Siswa And i-Belia And Six Other Programmes

- C [11] Learned counsel for the appellant referred us to two decisions of the Election Court in *Dato' Mohd Zubir Embong v. Datuk Hj Ahmad Amzad Mohamed* (EP No TA-260P-2-01-2023) and *Wan Mohamad Hisham Wan Abdul Hamid v. Che Alias Hamid Mohamed* (TA-26PP-4-01-2023), where these very same programmes, *inter alia*, form the grouses of the petitioners and the petition to nullify the victories of their respective respondents were allowed by the learned judges. We noted that there was no notice of appeal filed against these decisions.
- D [12] The giving of these aids during the campaign period is an undisputed fact. However, as rightly noted and considered by the learned election judge, which we had mentioned earlier and would again reiterate, the said aids were part of the budget approved by the Terengganu's State Legislature on
- E 15 November 2021, endorsed by His Royal Highness the Sultan of Terengganu on 27 January 2022, and then gazetted on 24 February 2022 (Terengganu Enactment A75). A paper on the implementation of the programs was earlier presented to and approved by the Terengganu's State Executive Council on 7 September 2022. However, considering that the applications for the aids had to be made online from 18 September 2022 to
- F 7 October 2022, the process of verification of the approval was from 8 October 2022 to 17 October 2022 and the approval process was from 18 October 2022 to 27 October 2022, the said programs could only be held from 30 October 2022 to 30 November 2022. Dissolution of Parliament was only made on 10 October 2022 and the Parliamentary General Election was
- G held on 19 November 2022. Therefore, on the face of it, the giving of these aids was not pre-planned to induce voters to vote for the respondent, although undeniably the timing was just right for the respondent. These two aids were presented by three persons (called as witnesses by the appellant himself, *ie*, PW8, PW9 and PW10, PW8 (whom we had named earlier)
- H during the last week of the campaign period till the day before the election itself. It must be emphasised that none of the recipients was called to give evidence. As noted by the learned election judge, PW8, PW9 and PW10 were either the Exco of the State or Deputy Exco. Learned counsel for the appellant submitted that since they were high-ranking officers (Pimpinan Tertinggi) in PAS, they were interested witnesses whose evidence must be
- I treated with extreme care and caution as held in *Goh Kooi Pheng v. PP* [2013] 1 CLJ 190; [2012] MLJU 1748 and *Magendran Mohan v. PP* [2011] 1 CLJ 805. Granted, that this is so but these witnesses were called by the appellant,

who gave evidence contrary to his case and were never declared as hostile witnesses by the court. The learned election judge had rightly evaluated their evidence and came to a finding that they handed the aids not as agents of the respondent but by virtue of their official positions in the Terengganu State Exco. On this score, it is pertinent to refer to the case of *Borough Of Plymouth* [1880] 3 O'M & H 107 cited by learned counsel for the appellant, where Mr Justice Lush at pp. 109 to 110 of the reports states as follows:

It is obvious that what are called charitable gifts may be nothing more than a specious and subtle form of bribery, a pretext adopted to veil the corrupt purpose of gaining or securing the votes of the recipients. And if this is found to be the object of the donor, it matters not under what pretext, in what form it may be, what person, or through whose hands the gift maybe bestowed, or whether it has proved successful in gaining the desired object or not.

However, learned counsel did not highlight the sentences that followed thereafter which we now reproduced below:

On the other hand, a gift may really be what it professes to be, the offspring of a purely benevolent impulse, and, if this be its character, it matters not whether the recipient makes a good or bad use of it, or what its effects may be upon him. A motive originally pure cannot become corrupt by reason of a misuse of what was intended to be a benefit.

(emphasis added)

[13] Thus, given the antecedent approval given by the State Executive Council to the giving of these aids which was, to quote Mr Justice Lush "a purely benevolent impulse," to equate it to a bribery, given that background of the said aids, would not be right because it cannot be said to be beyond reasonable doubt that those aids were meant to bribe the recipients. By concluding so, we are not, as cautioned by Clement Skinner J in *Kho Whai Phiaw v. Chong Chieng Jen* [2008] CLJU 785; [2008] 1 LNS 785; [2009] 4 MLJ 103, citing *S Harcharn Singh v. S Sajjan Singh & Ors* [1985] AOR 236, stretching that burden to the point of impossibility. We wish to also stress that we are not in any way disagreeing with learned counsel for the appellant's submission that the sanctity of election is of public importance for it is so in every country subscribing to a democratic process and that the giving of bribes disguised as aids if proven to be so pending an election process would destroy that very sanctity. It is just that in the factual circumstances of this case, we decided in the respondent's favour because there was nothing sinister in the giving of the said aids. In the circumstances, we reiterate that we are in agreement with the findings of the learned election judge and in the upshot, the appeal against His Lordship's decision was dismissed but with no order as to costs.